

Federal Register Notice ~ October 22, 2008
Direct Observation for Return-to-Duty and Follow-Up Testing
Mandatory November 1, 2008

1. On October 22, 2008, the Department of Transportation issued a Federal Register Notice concerning direct observation (DO) of urine specimens collected for return-to-duty and follow-up drug testing.
2. The effective date of 49 CFR 40.67(b), as amended by the Department on June 25, 2008, and delayed on August 26, 2008, is November 1, 2008.
3. Beginning that date [November 1], DO collections will be required for all return-to-duty and follow-up DOT tests.
4. When additional testing methodologies appropriate for return-to-duty and follow-up testing (for example, oral fluids and sweat specimens) are approved by the Department of Health and Human Services, the DOT intends to make these methods available to employers and employees as an alternative to direct observation urine testing in these situations.
5. Under 40.67(b), there are no individuals who will be directly observed who have not already been subject to being directly observed under previous versions of Federal safety requirements by refusing to test, using illegal drugs, or otherwise breaching the rules.
6. By this conduct, each of these individuals has shown a willingness to endanger public safety; and individuals in this category have a greater than average likelihood of using illegal drugs in the future and a higher than average motivation to cheat on a test.
7. Under these circumstances, the Department is justified in regarding these individuals as having a reduced legitimate expectation of privacy, compared to covered employees in general.
8. Given the increased availability of cheating products, compared to twenty years ago when Part 40 was first issued, the Department can properly adjust the balance between safety and privacy by making DO collections mandatory, rather than optional, in follow-up and return-to-duty testing.
9. We emphasize that conducting all return-to-duty and follow-up tests under DO – on and after November 1, 2008 – is a requirement of Federal law (including for employees whose initial violations of the rules occurred or whose series of follow-up tests began before November 1).

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